U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Date Issued: October 24, 2001

BALCA Case No. 2001-INA-137
ETA Case No. P1996-CA-0904

In the Matter of:

M & L JEWELRY MFG., INC.,
Employer,

on behalf of

CAROLYN RECIO,
Alien.

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification.[1] Employer is a jewelry manufacturer seeking to hire a Cost Accountant. (AF 26) We find that the grounds stated by the CO for denying this application are not supported by the record, and therefore reverse the denial of certification.

Employer filed its application for alien labor certification on September 5, 1995. (AF 26) The job requirements were a Bachelor of Science with a major field of study in Commerce/Accounting/Economics, and four years of experience in the job offered. (AF 26) Employer also required "checkable references." The job duties were described as:

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[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. 656.27(c).

Apply principals of cost accounting to conduct studies which provide detailed cost information not supplied by general accounting systems. Collect data to determine cost of merchandise for retail and wholesale. Analyze data obtained and records results using computer. Develop and install computer based cost accounting system. Analyze changes in jewelry design, material, and manufacturers sources to determine effect on costs. Provide management with reports specifying and comparing factors affecting prices and profitability of jewelry items.

(AF 26) Employer received four resumes as a result of a newspaper advertisement, and nine resumes referred from the state Employment Development Department ("EDD"). The recruitment report dated April 10, 1996 rejected all thirteen U.S. applicants. (AF 38-43)

1. Applicant Armedilla: Responded to newspaper advertisement. Rejected because he had not worked in the jewelry industry and did not have experience in analyzing changes in design, material and manufacturer sources. Also rejected because he had a B.A. rather than a B.S. degree.

   Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 46), and a Certified Mail Return Receipt showing a delivery date of March 5, 1996, and signed by a person whose last name is Armedilla. (AF 44)

2. Applicant Barrows: Responded to newspaper advertisement. Rejected because she did not timely supply references and because she had a B.A. rather than a B.S. degree. Employer called applicant twice to remind her to send references, but she still had not at the time of the recruitment report.

   Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 46), and a Certified Mail Return Receipt showing a delivery date of March 6, 1996. The recipient's signature is illegible. (AF 45)

3. Applicant Ames: Responded to newspaper advertisement. Rejected because he had not worked as a cost accountant and did not have experience in analyzing changes in design, material and manufacturer sources. Also rejected because he had a B.A. rather than a B.S. degree.

   Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 47), and a Certified Mail Return Receipt showing a delivery date of March 5, 1996, and signed by someone named "Delgio". (AF 44)

4. Applicant Soriano: Responded to newspaper advertisement. Rejected because he had

not worked in the jewelry industry and did not have experience in analyzing changes in design, material and manufacturer sources.

Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 47), and a Certified Mail Return Receipt showing a delivery date of March 6, 1996, and signed by someone named a person whose last name is Soriano. (AF 45)

5. Applicant Barlaan: EDD referral, no address or phone number provided – Applicant never contacted Employer.[2]

6. Applicant Agbo: EDD referral, no address or phone number provided – Applicant never contacted Employer.

7. Applicant Basin: EDD referral, no address or phone number provided – Applicant never contacted Employer.

8. Applicant Hartnett: EDD referral – Rejected because he had not worked in the jewelry industry and did not have experience in analyzing changes in design, material and manufacturer sources.

   Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 46), and a Certified Mail Return Receipt showing a delivery date of March 9, 1996, and signed by Mr. Hartnett. (AF 44)

9. Applicant Lee: EDD referral – Rejected because he had not worked in the jewelry industry and did not have experience in analyzing changes in design, material and manufacturer sources.

   Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 46), and a Certified Mail Return Receipt showing a delivery date of March 5, 1996, and signed by Mr. Lee. (AF 44)

10. Applicant Mangona: EDD referral – Rejected because he did not respond to Employer's certified letter or two phone messages.

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[2] Employer stated that EDD's policy was not to provide addresses and phone numbers of applicants to protect that applicants' privacy. Thus, job order referral applicants have to contact the employer.

		Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 47), and a Receipt for Certified Mail postmarked March 4, 1996 (AF 46). No return receipt is attached.
11.	Applicant Reyes:	EDD referral – Rejected because he did not respond to Employer's certified letter or two phone messages. Employer attached a Receipt for Certified Mail postmarked March 4, 1996 (AF 47). No return receipt is attached.
12.	Applicant Songkoon:	EDD referral, no address or phone number provided – Applicant never contacted Employer.
13.	Applicant White:	EDD referral – Not contacted because he was not qualified on the fact of his resume, never having worked as a cost accountant and not possessing the required B.S. degree.

The CO issued a Notice of Findings ("NOF") on January 15, 1998, proposing to deny labor certification under 20 C.F.R. § 656.21(b)(5) on the ground that the job requirement of four years of experience in analyzing '"changes in jewelry design, material, and manufactur[ing] sources...' does not appear to meet your true minimum requirements in that at the time alien was hired, she did not meet the requirement and you trained her or provided the necessary learning opportunities after she was hired." (AF 22) The CO also proposed to deny certification under sections 656.21(b)(6) and 656.21(j)(1)(iii) and (iv), on the ground that seven U.S. applicants (Armedilla, Barrows, Ames, Sorianoa, Hartnett, Lee and White) were unlawfully rejected for not having experience in the analysis of changes requirement. Finally, the CO proposed to deny certification under section 656.21(b)(6) and 656.20(c)(8) on the ground that there was insufficient evidence that two U.S. applicants (Mangona and Reyes) were contacted timely. The CO stated:

> Positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills). The evidence in hand is not convincing your efforts to contact applicants took place at all, or "as early as possible" as EDD had directed. The recruitment is considered tardy and incomplete.

(AF 23-24)

Employer filed a rebuttal dated January 28, 1998. (AF 14-20) In regard to the issue of the Alien's qualifications, Employer pointed out first that the Alien had not yet been hired, and second that the ETA Form 750B, showed the Alien's experience in analysis of jewelry design changes for another employer, Wedding Rings & Co. (AF 16, 120) Employer included as proof copies of W-2 forms to show that the

Alien had been working for the other employer. (AF 16, 31-35) Finally, Employer pointed out that the DOT allows for a specialization in analysis of changes in product design. (AF 16, 36)

In regard to the seven applicants the CO found were unlawfully rejected for not having experience in analyzing changes in jewelry design, material, and manufacturing sources, Employer essentially repeated the grounds stated in its recruitment report. (AF 16-19)

In regard to proof of the timely contact of two applicants, Employer noted that it was sent resumes from EDD on February 27, 1996, and that it mailed certified letters to all applicants on March 4, 1996. (AF 20)

The CO issued a Final Determination denying labor certification on July 27, 1998. (AF 6-7) The CO conceded that she was wrong about the Alien already working for Employer, but found nothing in the rebuttal referring to the Alien's experience in analyzing changes in jewelry design. The CO faulted Employer for requiring a reference letter of applicant Barrows because neither the advertisement nor the interview letter mentions the need for references. The CO drew the inference that applicant Barrows was qualified for the position because Employer did not take issue with her qualifications. The CO noted that the applicant was apparently trying to obtain a reference letter and therefore showing interest in the job. The CO also questioned whether a reference letter could be weighed as more important than an interview, and found that applicant Barrows was not given a fair chance to show qualification for the job. Finally, the CO found that a money receipt showing that a letter was sent to applicant Mangona was not adequate because there was "neither evidence of him receiving it nor of an attempt to call him on the telephone." Thus, the CO found that Employer had not proved that it exercised good-faith effort to recruit this applicant.

By letter dated August 21, 1998, Employer requested review of denial of certification. (AF 1-5) In the cover letter, Employer stated "Should said motion to reconsidered be denied, please forward immediately the request to the Chief Administrative Law Judge." (AF 1) In the request for review, Employer argued (1) that the Alien's qualifications for the job are clearly shown on the ETA 750A at Paragraph 15(a) [in further support of her qualification, Employer supplied a letter from Wedding Rings & Co. verifying her experience in cost accounting (AF 5)], (2) that BALCA decisions clearly support an employer's right to request verification of employment, and that Employer made all the attempts at contacting applicant Barrows both for the initial interview and to follow up on the reference letters, and (3) that the NOF identified the issue as whether applicant Mangona had been timely contacted – not whether there was evidence of receipt or of follow-up telephone calls as identified as grounds for denial for the first time in the Final Determination. Employer stated that neither the certified letter itself nor the return receipt were ever returned by the Postal Service. Employer also noted that its recruitment letter clearly stated that Employer attempted two follow-up telephone calls and left messages on an answering machine. Employer argued that it was unreasonable to ask an employer for the first time to obtain copies of telephone records two years after the calls were made.

On March 11, 1999, Employer wrote to the CO requesting that the application be immediately forwarded to the Chief Administrative Law Judge. (AF 10) On April 7, 1999, Employer faxed a copy of this letter to the CO. (AF 9)

The CO denied reconsideration on April 12, 1999, finding that she would only consider issues that could not have been addressed in the rebuttal, and indicating that the case would be forwarded to BALCA.[3] (AF 8)

Discussion

Alien's Qualifications

We find that the Alien's qualifications for the job are stated on the ETA 750B, and that this was clearly stated in Employer's rebuttal (AF 16). The CO's finding in the Final Determination that Employer's rebuttal did not address this issue is simply wrong.[4] We find that the record supports a finding that the Alien possessed the minimum qualifications for the job, and that a violation of section 656.21(b)(5) is not supported.[5]

Requirement of Written References

Employer correctly cited BALCA caselaw to the effect that an employer may reasonably request an applicant to supply written references, *see, e.g., Al-Ghazali School*, 1988-INA-347 (May 31, 1989) (*en banc*), although we hasten to add that in some circumstances such a requirement may be seen as not in good faith if there is evidence that an employer is merely using a references requirement as an additional

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[3] The Board received a letter from Employer's attorney on July 16, 2001, inquiring as to whether the Board had been transmitted the file. On July 24, 2001, the Board responded that it had not docketed this case, and suggested that Employer re-contact the CO. The Board received the file on August 28, 2001, and issued a Notice of Docketing on August 30, 2001. In view of the overall age of the case, the Board has expedited review of this matter.

[4] Moreover, the CO's denial of reconsideration on the ground that the reconsideration raised issues that could have been addressed in the rebuttal is not well-grounded. Employer's motion for reconsideration responds to the CO's clearly erroneous finding in the Final Determination that the rebuttal did not address the Alien's qualifications. We find that it was arbitrary and capricious for the CO to refuse to consider the motion on this ground.

[5] The CO based denial on the ground that the Alien did not possess experience in analyzing changes to jewelry design, material and manufactures sources as required by section 656.21(b)(5), and not on business necessity under section 656.21(b)(2)(i). Thus, we do not consider business necessity for this requirement to have been raised by the CO as an issue in this case.

hurdle to discourage otherwise qualified U.S. workers.[6] *See, e.g., Father Robert J. Brooks, M.A.*, 1997-INA-551 , slip op. at n.3 and surrounding text. (May 13, 1999).

There is no evidence in the instant application, however, that Employer was merely using the references requirement as a means to discourage U.S. applicants. In fact, Employer's recruitment report details the efforts Employer made both to contact applicant Barrows to set up an interview and to obtain the requested references. The references were requested on March 7 and, although on March 21 she told Employer that she was trying to get them and would fax or mail them as soon as possible (AF 40), as of the date of the recruitment report on April 10, 1996 the applicant had failed to do so. Thus, the applicant had over a month to provide written references and did not do so. A position as a accountant is a professional position in which a request for references is reasonable. Accordingly, we find that a purportedly unlawful request for references is not supported as a ground for denial of certification in this case.

Documentation of good faith efforts to contact Applicant Mangona

In *M.N. Auto Electric Corp*., 2000-INA-165 (BALCA Aug. 8, 2001) (*en banc*), the Board, *en banc*, affirmed the principle that when an employer files an application for labor certification, it is signifying that it has a *bona fide* job opportunity which is open to U.S. workers. The Board held that inherent in this presumption is the notion that the employer legitimately wishes to fill the position with a U.S. applicant and will expend good faith efforts to do so. The Board, however, held that in order to establish good faith recruitment, an employer does not need to establish actual contact of applicants, but only reasonable efforts to contact applicants. Accordingly, the Board held that a CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants. Rather, the Board held that an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certified mail return receipts to document its contacts with U.S. applicants. Moreover, a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants

In the instant case, Employer has presented documentation indicating that it mailed a certified letter to applicant Mangona.[7] Although it does not have a returned letter or a return receipt to document the

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[6] We note that the NOF seems to be based only on rejection of applicants for not having experience in analyzing changes in jewelry design, materials and manufacturing, and does not mention the request for references. Since the applicants who were rejected for not having this experience were not mentioned in the Final Determination, the issue was not preserved for review by this Board. Even assuming that the issue was preserved, however, in view of our finding that the "analyzing changes" requirement did not violate section 656.21(b)(5), it was proper for the Employer to reject applicants who did not have this experience.

[7] We agree with Employer that the NOF suggests that the CO's concern was with timely contact of applicants and not documentation of alternative means of contact. Since we find Employer's

disposition of the letter, such proof is not the *sine qua non* of documentation of good faith in recruitment. Employer has certified mail receipts showing that it sent certified mail contact letters in a timely fashion. For some applicants, it presented return receipts showing delivery of the letters. There is no evidence of record of U.S. applicants denying that they were contacted by Employer. Moreover, Employer presented a detailed recruitment report averring numerous attempts to telephone applicants who did not respond to the certified letter. Employer actually interviewed several applicants, whom we note had resumes similar to Applicant Mangona's resume. Thus, this does not appear to be a case where Employer was avoiding interviewing apparently qualified applicants. Although certified return receipts and telephone billing records would have made a better case of good faith in recruitment, viewing the record as a whole, we find adequate documentation of good faith recruitment.[8]

ORDER

In view the foregoing, we REVERSE the CO's denial of labor certification and remand this matter for the GRANT of certification.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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overall effort to contact applicants was in good faith, however, we do not decide whether the NOF provided inadequate notice of the issue upon which certification was being denied.

[8] Although the NOF also mentioned Applicant Reyes in respect to documentation of timely efforts to contact, the Final Determination did not. Accordingly the issue in regard to Applicant Reyes was not preserved for Board review. Even assuming that the issue is still active, however, we find no violation of good faith in recruitment for the same reasons stated in the text above regarding Applicant Mangona.

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.